JD(NY)-38-11
Buffalo, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ISLAND OASIS MANUFACTURING, LLC

and **Cases 3-CA-27996**
3-CA-28104

BAKERY, CONFECTIONERY, TOBACCO WORKERS & GRAIN MILLERS, AFL-CIO, CLC, LOCAL 36G

***Linda Leslie, Esq.,* Buffalo, NY, for the Acting General Counsel.**
***James N. Schmit, Esq. (Jaeckle Fleischmann & Mugel, LLP),* Buffalo, NY, for the Respondent.**
***Thomas W. Bingler*, Business Representative, Buffalo, NY, for the Union.**

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on a charge in Case No. 3-CA-27996 filed by Bakery, Confectionery, Tobacco Workers & Grain Millers, AFL-CIO, CLC, Local 36G (Union), on March 10, 2011, and a charge in Case No. 3-CA-28104 filed by the Union on June 28, 2011, a complaint was issued on July 18, 2011 against Island Oasis Manufacturing, LLC (Respondent).[1]

The complaint alleges and the Respondent admits that it failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of a unit of production, maintenance and local truck drivers employed by it at its 1155 Niagara Street, Buffalo location. The complaint further alleges, and the Respondent also admits that it failed and refused to furnish the Union with certain information requested by it. The complaint alleges that the bargaining unit involved herein had been represented by, and had been the subject of a collective-bargaining agreement between the Union and Rich Products Corporation (Rich Products or Rich).

The basis of the complaint is that the Respondent is the legal successor to Rich Products inasmuch as it has leased certain equipment and the building formerly occupied and operated by Rich Products, has operated the business of Rich Products in basically unchanged form, and has employed as a majority of its employees, individuals who were previously employed by Rich Products.

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[1] The Respondent's answer denies the filing and service of the two charges. General Counsel Exhibit No. 1(a-d) establishes that the charges were filed on the dates set forth above, and that they were served on the Respondent as evidenced by affidavits of service executed by Board personnel.

The Respondent's answer denied the material allegations of the complaint, and on August 23, 2011, a hearing was held before me in Buffalo, NY.

Upon the evidence presented in this proceeding and my observation of the demeanor of the witnesses and after consideration of the briefs filed by Counsel for the Acting General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction and Labor Organization Status

The complaint alleges, and the Respondent admits, that it is a corporation having a place of business located in Buffalo, New York where it is engaged in the manufacture of frozen beverages. The Respondent also admits that, annually, it has sold and shipped from its Buffalo, New York facility, goods valued in excess of $50,000 directly to points outside New York State, and that, at all material times, it has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. Background

In July, 1975, the Union's predecessor was certified by the Board as the exclusive collective-bargaining representative of certain employees of Rich Products. The last collective-bargaining agreement between Rich and the Union was in effect from November 6, 2006 to November 6, 2011, and covered the following unit:

> All production and maintenance associates and all local truck drivers employed by the Company at its facilities presently located on Niagara Street, Buffalo, New York, excluding all office clerical associates, over-the-road truck drivers, laboratory and quality control associates, managerial associates, salesmen, professional associates and guards and Team Leaders as defined in the Act, and all contractor's associates.

On April 8, 2010, Rich Products sent a letter to the Union, advising that it would be closing its facility on Niagara Street, and permanently laying off its 24 unit employees, beginning on about July 30, 2010. The majority of the employees were laid off on July 30, but about three worked, as a skeleton crew, to aid in the close-down process until November, 2010.[2] A list of the laid off workers and their titles was attached to the letter.

On May 11, 2010, Rich Products executed a Termination Agreement with the Union which provided that Rich will cease all production and maintenance work at its Buffalo facility and relocate such work. The Agreement also provides that the parties' collective-bargaining agreement remains in effect except for any term modified or terminated by the Termination

[2] Their names were not identified on the record, but three former Rich employees were noted as having been hired by the Respondent on November 15, 2010: James Cook, Daniel Daruszka, and Thomas Kiera.

Agreement. The Agreement provided for the payment of severance pay and medical and dental benefits based upon the employee's years of service with the company. The contract provided further that:

> Acknowledgement of Satisfaction and Release: The Company has provided all legally required notice to the Union related to the termination and relocation of bargaining unit work. The Union, on its own behalf and on behalf of all bargaining unit members, for and in consideration of the mutual covenants made herein, hereby releases and discharges the Company, its parents and subsidiaries, and their respective officers, directors, shareholders, attorneys, successors, and employees ("Released Parties"), of and from all, and all manner of action and actions, cause and causes of action, contracts, agreements, promises, damages, claims and demands whatsoever, in law or in equity, whether known or unknown, which against the Released Parties, the Union and its bargaining unit members, ever had, now have, or hereafter can, shall or may have, relating to the termination and relocation of bargaining unit work including, but not limited to, any claims arising under the National Labor Relations Act, the collective bargaining agreement or any memoranda of understanding or agreement.

B. The Respondent Leases Rich's Equipment and Building

The Respondent's president, Antonino Battaglia, testified that its "core business" since its inception 27 years ago is the manufacture of frozen beverages. Its only production facility, until 2010, has been in Byesville, Ohio. He described his business as being a "product and equipment supplier" to McDonald's Corporation, its "most significant customer." In January, 2010, the Respondent began producing frozen beverages for McDonald's. Its Ohio plant was operating non-stop, when McDonald's asked it to expand its capacity so that it could meet a projected production of 3.1 million cases of beverages beginning in March, 2011. That number, which was one million more cases than it had been producing, could not be reached in its Ohio plant with the existing equipment.

In order to meet McDonald's demand for more production, the Respondent needed an additional aseptic processor. The processor is a piece of equipment in which the sterile food item is mixed, cooked, and exposed to ultra high temperature in order to sterilize it, and then cooled. It is then placed in sterilized containers to maintain its purity and sterility.

It was common knowledge in the industry that Rich Products was closing and that it was selling its processor and other equipment. The Respondent engaged in discussions with Rich regarding the purchase of this machinery for its use in producing the McDonald's products. At the same time, the Respondent considered whether it should move the processor from Buffalo to Ohio in order to make the product in its Ohio plant.

In the summer of 2010, a feasibility study was done, and the Respondent determined that it would be too costly to move the processor to Ohio. It then undertook to determine whether it could lease Rich Products' facility and equipment and produce and pack the McDonald's products in Rich's former Buffalo facility. After an inspection by McDonald's, it was agreed, in August or September, 2010, that the Respondent could utilize the Buffalo facility to produce and pack McDonald's products. Thereafter, on November 8, 2010, leases for the rental

of the Rich Products building and equipment were executed by the Respondent.

In addition to the processor, the Respondent leased filling and packing equipment. After the product is processed it is sent to a holding tank, and then to fillers which place the product in packages, which are then closed and sent by conveyor where they are placed in a box and then to a palletizer where 50 cases of product are shrink-wrapped and loaded onto a truck.

The Respondent utilized the leased fillers and packaging equipment to fill and pack the Rich Products it continued to manufacture after it began operating in Buffalo. However, it needed new filling equipment for the McDonald's products which are packaged in a foil-lined bag equivalent to a two gallon case, whereas Rich products are filled into a Combi-bloc package equivalent to a three gallon case.

New filling and packaging equipment, from the holding tank to the palletizer was purchased for the McDonald's line of products. Such new filling and packaging equipment for the McDonald's products, which had not existed in the Rich Products facility prior to the Respondent's operation there, cost the Respondent about $2 million.

In order to accommodate the new filling equipment, the Respondent renovated a building used as a warehouse by Rich. The renovation, which included removal of the racks, floor, and the construction of a production floor and walls, cost the Respondent more than $3 million.

Battaglia stated that the fact that the Respondent used the same processor as was used at Rich Products does not mean that it was in the same business or making the same product as Rich Products made. He emphasized that the Respondent's main product was the McDonald's product. Battaglia stated that, although the processor is in the same location now as it had been when Rich Products operated the plant, the processor had been dismantled by Rich in contemplation of it being sold. When the Respondent agreed to lease the processor, its employees had to reassemble the processor.

C. The Hire of Employees who Formerly Worked for Rich Products

In mid January, 2011, Thomas Bingler, the Union's business representative, read a newspaper article that the Respondent expected to begin production at the Niagara street facility and hire certain employees. He contacted the former employees of Rich and learned that they had already been hired by the Respondent and were employed at the facility.

On February 11, Bingler sent a letter to Michael Herbert, the Chief Executive Officer of the Respondent, advising him that the Union "is the collective bargaining representative of all the unit employees at the facility who were formerly employed by Rich Products." The letter stated that "since your workforce is comprised of at least a majority of these incumbent workers, you have an obligation to recognize and bargain with Local 36G as a successor employer." The letter also asked for the following information:

1. A current list of all bargaining unit employees, including their names, job titles, shifts, status as full-time or part-time employees, rates of pay, benefits, home addresses, home phone numbers and e-mail addresses.
2. A copy of the purchase, sale, and/or lease agreement between Rich Products Corporation and Island Oasis for the Niagara Street facility.

3. Copies of all documents referring to and/or concerning the application and hiring of former bargaining unit employees of Rich Products Corporation, the predecessor employer, by Island Oasis including without limitation, the completed application forms, completed questionnaires and documents distributed to those employees.
4. Copies of all documents concerning and/or referring to employment at Rich Products Corporation and/or Island Oasis which you distributed to bargaining unit employees.

On February 17, Herbert replied that the Respondent "is not a successor employer under the National Labor Relations Act. Accordingly, your requests for recognition and bargaining are denied. Similarly, your request for various types of information is also denied."

Employees Guy Massina and Peter Nightingale were long-time employees of Rich Products.[3] Both were members of the Union, and were laid off in July, 2010. In the summer or fall of 2010, they received applications for employment by the Respondent, and were hired. They both worked in the same capacity for the Respondent, process operator, as they had worked for Rich Products. Nightingale testified that the process to make the product is the same at the Respondent as it was at Rich Products. Their wages were identical for both companies, but their benefits differed from one company to the other. They testified that three former Rich supervisors became employed in the same capacity at the Respondent. They are Sue Browning, their direct supervisor, Thomas Powell, the maintenance supervisor, and Dennis Peterson, who was in charge of regulatory compliance.

Battaglia testified that the Respondent offered the former Rich Products employees jobs for two reasons. First, the leases were signed in November, 2010, and it had to be in full production only four months later, in March, 2011. Second the Respondent recognized that the plant's equipment was "sophisticated ... and that not everyone off the street can just come in and operate [it]. We understood that there was very good, well-trained employees that were unemployed in the Buffalo area and we thought we were making a prudent move in looking at those employees to hire back, to run the existing equipment in the facility, as well as the new equipment in the facility, and that would enable us to get up quicker, that would enable us to be producing quality product on day one by minimizing any risks of having people who aren't trained in that equipment. And that's what we did."

D. The Respondent's Employee Complement

When Rich Products shut its operation and laid off its employees, it employed 23 unit employees.[4] As set forth above, Cook, Daruszka, and Kiera were hired on November 15. Porter was hired on November 29. Buckley, Massina, and Nightingale were hired on December 6, Gallivan, Hint, and McHenry were hired on December 13, and two others, Bearfield, Esford, Jr., Kosmowski, and Phrakousonh were hired in January, 2011. However, no production took place

[3] Indeed, many of the former Rich employees who worked for the Respondent had been employed by Rich for more than 25 years.

[4] Gary Bazinet, Jake Bearfield, Kevin Buckley, James Cook, Daniel Daruszka, John Davis, Donald Esford, Jr., Patrick Gallivan, Ronald Golombek, James Hint, Thomas Kiera, Joseph Kosmowski, Ronald Kosmowski, D. Martin, Guy Massina, David McHenry, Peter Nightingale, James Pease, Voradeth Phrakousonh, Thomas Porter, Robert Reidy, Dennis Schmelzinger, Susan Vervaeke, and Gerald Weaver.

at that time. Rather, renovation work was being done on the production floor and new equipment was being installed.

Full production at the Respondent's facility began with the first runs of McDonald's products on March 8, 2011. At that time, it employed 16 unit workers, 14 of whom were former Rich employees.[5] According to the job titles set forth in Rich's April 10 letter, and the job titles in the Respondent's records (G.C. Exhibit 9), the former employees of Rich Products were assigned to perform essentially the same duties by the Respondent as they had performed for Rich Products.[6]

E. The Products Manufactured

President Battaglia testified that the Respondent manufactures products at its Niagara Street facility for various customers. It produces various fruit-based products such as fruit beverages for McDonald's, its main customer, including apple juice, strawberry/banana, wildberry, lemonade, and mango pineapple. It also produces its own products such as barista fria vanilla, barista fria caramel, and mocha.

Rich Products had manufactured non-dairy creamers, fruit-based products, toppings, icings and strawberry daiquiris. It also produced fruit-based items such as mango and strawberry colada for Archer Farms, and coffee coolatta for Dunkin' Donuts.

The Respondent also makes products for Rich Products, including non-dairy creamers, fruit-based products, and flan, mango, strawberry, avocet, versatie, and crème brulee. The Respondent also produced the same Archer Farms products that Rich had made. Battaglia testified that while the Respondent made some products for Rich Products, including those which Rich had formerly made in its facility, the Respondent had no agreement with Rich to make those products at the facility. Rather, the Respondent acts as a "co-packer" for Rich, in which the Respondent makes and packages Rich's products for Rich using Rich's brand names.

Dunkin' Donuts had been a customer of Rich, for which Rich made certain of its products. After Rich Products closed, Dunkin' Donuts asked other suppliers to bid for the work. The Respondent and other companies did so, and the Respondent received preliminary approval to produce certain products such as coffee coolatta, and coffee for Dunkin' Donuts. Pursuant to that preliminary approval, the Respondent made several test runs in mid to late June, and in late July, 2011. However, it has not yet received approval from Dunkin' Donuts to begin regular production of its products. Battaglia denied that this arrangement with Dunkin' Donuts constitutes a "continuation of the business" of Rich Products.

Battaglia explained that the Respondent's operation is designed to operate continuously without shutting down. If its equipment is not being utilized to make products for its main customer, McDonald's, it utilizes the time and equipment in the most efficient manner, by producing products for other companies such as Rich.

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[5] Bearfield, Buckley, Cook, Daruszka, Esford, Jr., Gallivan, Hint, Kiera, Joseph Kosmowski, Massina, McHenry, Nightingale, Phrakousonh, and Porter.

[6] The applications for employment completed by the former Rich employees contain the descriptions of the work they performed for Rich and "position applied for." (G.C. 11). When those descriptions and positions sought are compared to the Respondent's summary of their "position" at the Respondent following their hire (G.C. 9), it is evident that the employees worked in the same positions doing the same jobs at the Respondent that they performed for Rich.

Battaglia stated that 70% of the volume of products produced at the facility was McDonald's or "Island Oasis" branded. He noted that he expected that the volume of McDonald's products would have been greater, up to about 90% of the plant's production, but that has not occurred.

The Respondent's 2011 production summary from December 22, 2010 to August 18, 2011 was received in evidence. It shows that very limited production was made of Rich products in December, 2010 (two days), in January (five days), in February (six days), and no products of any other companies were made in those months.

Regular production began on March 8, 2011. The records establish that in March, McDonald's products were made on 13 days, and Rich products were made on 7 days. In April, McDonald's products were made on 22 days, and Rich products were made on one day. In May, McDonald's products were made on 14 days, Rich products were made on 5 days, and both McDonald's and Rich products were made on one day.

In June, the Respondent produced McDonald's products on 3 days; Rich products on 6 days; Both McDonald's and Rich products on 2 days; products for Respondent's Barista Fria on 3 days; Dunkin' Donuts products on 8 days; and Rich's and Dunkin' Donuts products on one day.

In July, the Respondent manufactured Rich products on 9 days, the Respondent's Barista Fria products on 3 days, and Dunkin' Donuts products on 3 days. From August 1 through August 18, the Respondent produced McDonald's products on 8 days, Rich products on 3 days, and the Respondent's Barista Fria products on 2 days.

Analysis and Discussion

A. The Successorship

The test for determining successorship under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972) is well established. An employer, generally, succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a "substantial and representative complement," in an appropriate bargaining unit are former employees of the predecessor and if the similarities between the two operations manifest a "'substantial continuity' between the enterprises." *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27, 41-43 (1987).

The Board will normally assess whether an employer is a successor as of the time a union makes its demand for recognition and bargaining, provided the employer has already hired a substantial and representative complement of employees. See *MSK Corp.,* 341 NLRB 43, 44-45 (2004).

1. The Appropriate Collective-Bargaining Unit

In its answer to the complaint, the Respondent denies knowledge or information that the alleged collective-bargaining unit is appropriate. The unit, as set forth above, is a production and maintenance unit including all local truck drivers employed by the employer located at Niagara Street in Buffalo. Such a unit is standard in the manufacturing industry.

Critical to a determination of successorship is whether the bargaining unit of the predecessor employer remains appropriate for the successor employer. As set forth above, the Union or its predecessor represented the employees at this facility in this virtually identical unit for the past 35 years.[7]

The evidence establishes that the same employees who worked at Rich worked in essentially the same positions at the Respondent performing the same essential work using essentially the same equipment and working under the same supervisors. I accordingly find that the appropriate collective-bargaining unit recognized by predecessor Rich Products remains an appropriate collective-bargaining unit under the Respondent.

2. The Substantial Continuity of the Operations

The determination whether a "substantial continuity" exists between the two companies includes "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." *Fall River*, above at 43.

The Supreme Court emphasized that in reviewing the facts in an alleged successorship, the factors must be analyzed primarily from the perspective of the employees—whether "those employees who have been retained will understandably view their job situations as essentially unaltered." *Fall River*, at 43. Although each factor must be examined separately, the totality of the circumstances is determinative.

Regarding the above factors, I find that the essential nature of the business of both employers is essentially the same. Both companies produced and packaged liquid food products in an aseptic, sterile process.

Both enterprises used essentially the same equipment, a processor and filling equipment. The processor used by Rich and the Respondent is the same. The filling equipment used to fill Rich's products is also used by the Respondent to fill those products. However, new filling equipment was obtained for the McDonald's products, including different packaging for McDonald's goods than are used for Rich's products. However, the same essential filling process continued. Thus, after processing, the product for whichever company's product was being produced was sent to filling equipment which placed it in packages, then sent to a palletizer, shrink-wrapped and loaded onto trucks.

As set forth above, the employees of the Respondent are doing essentially the same jobs in the same working conditions in the same facility with the same supervisors as existed under Rich Products. Although some of the products made are new, such as McDonald's products, the processing of those new products are essentially the same as the other products made, including the same products produced by the Respondent which were previously made by Rich.

When viewed from the perspective of the employees, it is clear that the employees who

[7] There are some minor variations in the unit between the unit certified in 1975, G.C. 2, and the unit set forth in the current contract's collective-bargaining unit. For example, "all truck drivers" are included in the certification but only "local truck drivers" in the current contract. Such differences are immaterial.

have been retained viewed their jobs as essentially unaltered. Massina and Nightingale testified that their jobs and their wages were the same - only the benefits were reduced.

Thus, the employees employed by the Respondent were engaged in essentially the same production processing process as when they worked for Rich. The Respondent argues that a new product, McDonald's items are being produced by the Respondent whereas McDonald's products had never been produced by Rich.

However, viewing their jobs from the employees' perspective, it could have made no difference to the workers whether they were sterilizing the equipment prior to processing McDonald's or Rich's products, whether they were downloading the formula for McDonald's products or Rich's, whether they were batching either company's product, or whether the filling equipment filled the containers with McDonald's or Rich's products. They were doing their old jobs and operating essentially the same equipment regardless of which liquid was flowing through the machinery they operated.

The Respondent argues that there is no substantial continuity of operations between Rich and itself. It contends that it has not replaced Rich's past operations inasmuch as that company has transferred its production elsewhere. Furthermore, the Respondent notes that it did not purchase Rich's stock, purchase orders, receivables, product formulae, inventory or goodwill. Rather, it asserts that it leased Rich's building and equipment only with the intention of increasing its business with its main customer, McDonald's. It states that it manufactures the products that Rich made, only because it must keep its equipment running constantly, and to make additional revenue when production of McDonald's products is not called for. As support for this argument it contends that it has no "agreement" to manufacture Rich's products.

I cannot agree with the Respondent's positions. Whether the Respondent had a formal agreement or not, it must have some arrangement with Rich to produce its products. Further, the Respondent only expected that McDonald's products would constitute 90% of the plant's production. Clearly, it contemplated that at least 10% of its production would be of Rich Products, and it has produced Rich's products since it began operating in March, 2011. Although its intention in leasing the equipment and buildings was to service its main customer, McDonald's, in fact, it is continuing to produce Rich's products using the leased equipment in the buildings it leased.

The Respondent argues that it cannot be considered a successor employer to Rich Products because, in *Harter Tomato Products Co.,* 321 NLRB 901, 902 (1996), the Board specified two instances in which a successorship may arise. The first, where the employer has purchased the predecessor employer's business, and the second where it "succeeded the predecessor employer on a contract for the performance of services." However, those two examples set forth in *Harter* were only two illustrations of "typical" successorship cases, and clearly were "not meant to act as a limitation on the types of transactions that amount to a substantial continuity sufficient to trigger a bargaining obligation." *Southern Power Co.*, 353 NLRB 1085, 1091 (2009).

In *Capitol Steel & Iron Co.,* 299 NLRB 484, 487-488 (1990), the Board found a successorship where the new company changed the types of steel fabricated by the predecessor. The Board stated that "changes in the product mix do not preclude a continuity finding if the basic job skills remain the same," noting that "this is not a case where a steel mill was converted into a bakery." *Good N' Fresh Foods*, 287 NLRB 1231, 1235 (1988). Here, too, the basic business of the facility both during Rich's operation of the facility and the Respondent's, was to process and pack liquid food products.

The Respondent further argues that it does not have the same "body of customers" that Rich had. However, as noted above, the Respondent continues to manufacture products previously produced by Rich. The Board has found a successorship where there has been a change in customers. *Pennsylvania Transformer Technology,* 331 NLRB 1147, 1150 (2000).

There is some support for the Respondent's argument that the unit employees who were previously employed by Rich could have had no reasonable expectation of continuing representation by the Union because Rich closed its operation. In support of its argument, the Respondent points to the seven month hiatus between the closure of Rich Products in late July, 2010, and the start of full production in the Respondent's facility in early March, 2011. I agree with the Respondent's contention that the Termination Agreement made clear to the Union and Rich's employees that Rich was closing with no likelihood that the employees would regain their positions at Rich's Buffalo facility.

However, in this respect, it is significant that three employees worked for Rich from July, 2010, after the close-down, to November 15, 2010 when they were hired by the Respondent. It is apparent that their duties, beginning in November when they were hired by the Respondent, were directed at the Respondent's start-up of operations. In addition to those three, the Respondent hired a total of 11 additional former Rich Products employees in November, December and January, 2011, who worked in behalf of the Respondent's operations beginning 3½ months before full production began on March 8, 2011.

Accordingly, the three employees who remained in the employ of Rich from the close-down in July to November, 2010 and who were then hired by the Respondent on November 15, only one week after the leases were signed by the Respondent, would undoubtedly have had the expectation that their employment would continue as they watched the renovation begin.[8] In addition, as employees were hired later in November, December and January, their expectation of continued employment, even before full production began in March, was obvious. Thus, a skeleton crew of three was employed by Rich up until the Respondent began operations and that crew was then hired by the Respondent. Skeleton crews were also employed by the predecessors in *Fall River*, where there was a seven month hiatus, and in other cases where a longer hiatus occurred and where a successorship was found. *Pennsylvania Transformer Technology,* above, at 1150 (two year hiatus); *Tree-Fiber Co*., 328 NLRB 389, 389 (1999) (16 month hiatus).

Although seven month and longer periods of hiatus were present in other cases in which a successorship was found, during such periods the unions remained active in meeting with potential buyers, and maintaining contact with the former employees. *Fall River*; above, *Citisteel USA,* 312 NLRB 815, 816 (1993), enf denied 53 F.3d 350, 355 (1995). However, here, where Rich's plant was shut down there was little for the Union to do inasmuch as it did not expect the plant to reopen. However, when the Union became aware that the Respondent was beginning production at the plant it immediately contacted Rich's former employees and learned that they had been hired.

The Respondent argues that the hiatus period here is seven months, from the time of Rich's close-down on July 30, 2010 to the beginning of full production on March 8, 2011.

[8] Those employees were Cook, Daruszka, and Kiera. Massey and Nightingale, who began work in early December, stated that a massive renovation project was underway with new equipment being installed.

However, the hiatus, from the employees' perspective, was in fact, shorter, because 14 of the former Rich employees were hired by the Respondent in November through December, 2010, beginning only 3½ months after Rich's closedown.

Nevertheless, hiatus is "only one factor to be considered and is relevant only when there are other indicia of discontinuity." *Fall River,* above, at 45. In addition, although each successorship factor must be analyzed separately, the determination depends on a consideration of the totality of the circumstances. *Fall River*, above, at 45. As noted above, the critical analysis must be "whether those employees who have been retained will … view their job situations as essentially unaltered."

Thus, the inquiry centers on the employees' views at the time that they have been hired by the Respondent and not when they were dismissed by Rich. When viewed from their perspective at the time they began work with the Respondent, they must have believed that they would be performing the same type of work that they had when they were employed by Rich. After all, they were employed at the same facility, and the processor was being reassembled for use by the Respondent. In addition, the three supervisory personnel who had worked at Rich were among the first to be hired. Thus, Peterson, who was in charge of regulatory compliance and Powell, the maintenance supervisor, were hired on November 15. Browning, the employees' direct supervisor, was hired on November 29. It is clear that the former Rich employees, returning to the facility after being terminated and seeing their former supervisors now employed by the Respondent, must undoubtedly have believed that their jobs remained unchanged.

The unchanging nature of the former Rich's employees' jobs is supported by the Respondent's reasons for hiring them. It wanted a crew of employees who were experienced with the complex equipment and machinery formerly used by Rich and which continued to be operated by the Respondent, and it wanted a quick resumption of operations at the facility.

The Respondent further argues that the renovations it made to the facility, including converting Rich's warehouse to a filling facility and the installation of new filling equipment for McDonald's products renders its operation different from Rich's. I cannot agree. As noted above, its essential business remained the same as Rich's. *In Foodway of El Paso*, 201 NLRB 933, 936-937 (1973), the Board found a successorship where the new company instituted a new system for loading and unloading merchandise, stocked "private label" merchandise, remodeled and repainted the store, changed the store name and sign, changed the shelving arrangement, and shifted merchandise. The Respondent's reliance on *Radiant Fashions, Inc.,* 201 NLRB 938, 940 (1973) is misplaced. In not finding a successorship, the Board, in this pre-*Fall River* case, relied on the facts that the new company acquired virtually none of the predecessor's customers, and that there was a "substantial change in the nature and character of the employing industry" where a completely new product line was introduced. Here, the Respondent continued to produce Rich's products, and there was no change in the "nature and character of the employing industry." In addition, *Fall River* placed the emphasis on whether the employees view their job duties as essentially unchanged, a factor not considered in *Radiant Fashions*.

The Respondent also argues that, by virtue of the Termination Agreement, the Union and the employees released Rich "and its successors" from any claim they had or will have "relating to the termination … of bargaining unit work including claims arising under the National Labor Relations Act." The Respondent also argues that the Termination Agreement acted as a waiver by the Union to any representational rights concerning the unit employees. It contends that the Union recognized that its right to represent the employees had ended, and asserts that the Agreement's use of the term "successor" means that the Union waived its right to seek

recognition and bargaining from the Respondent.

The Termination Agreement is a sophisticated, six-page document which was the result of negotiations between Rich and the Union and provided for benefits to the terminated workers which included consideration for hire at other Rich locations, group medical and dental benefits, severance pay, performance incentives, paid time off, and career transition letters. The Agreement dealt solely with the relation between Rich and the Union as it related to the terminated employees and the work they did while employed by Rich at the Niagara Street facility. It did not, and could not affect the relationship between the Respondent, its employees and the Union, or the Union's statutory right to claim to represent the employees. The Agreement's language releasing Rich and its successors from any claim relating to the termination of bargaining unit work clearly refers to any claim arising from the work which had been performed by Rich and its employees prior to the closure of Rich's operations. It could not, and did not refer to future claims for work performed by the Respondent or its employees, and did not affect the Union's fundamental right to represent the unit employees or the Respondent's independent, statutory duty to recognize the Union. *Transmontaigne, Inc.,* 337 NLRB 262, 263 (2001).

While it is true that Rich Products closed its operations and did not expect to resume operations at the facility, nevertheless, the plant was fully operational seven months later, with Rich's products continuing to be produced. Even though it is clear that the employees had no expectation of continued employment by Rich when they were terminated in July, 2010, they accepted and began employment with the Respondent when offered the same types of jobs with it beginning in November, 2010. In considering the totality of circumstances, which I do, I must conclude that, from the employees' perspective, there was a substantial continuity of operations between the two companies.

3. Whether a Majority of the Respondent's Employees were Former Employees of Rich Products in a Substantial and Representative Complement of Employees

"Where a union demands recognition from a prospective successor employer before that successor has hired a substantial and representative complement of employees, the union's demand is deemed to be a continuing one and the successor's bargaining obligation matures once it hires a substantial and representative employee complement." *MSK Corp.,* above.

In *Fall River*, above at 52, the Supreme Court held that "the successor's duty to bargain at the 'substantial and representative complement' date is triggered only when the union has made a bargaining demand." The Court approved of the Board's "continuing demand" rule in a successorship context. The Court also held that a union's demand, made prematurely, before a substantial and representative complement of employees has been employed, remains in force until the moment when the employer attains such a complement.

As set forth above, the Union made a valid demand for bargaining on February 11, 2011. The demand was made prematurely before the Respondent employed a substantial and representative complement of employees. Accordingly the question is whether, and at what time, such a complement was employed and whether, at that time, a majority of the Respondent's employees were formerly employed by Rich Products.

The substantial and representative complement rule fixes the "moment when the determination as to the composition of the successor's work force is to be made." *Fall River*, above at 47. This rule "represents an effort to balance the objective of insuring maximum

employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible." *Fall River*, above at 47.

Regarding the standard for determining whether an employer has hired a substantial and representative complement of its workers, "the Board finds an existing complement to be substantial and representative when approximately 30 percent of the eventual employee complement is employed in 50 percent of the job classifications." *Shares, Inc*., 343 NLRB 455 fn. 2 (2004). Under this standard, a substantial and representative complement of employees was achieved when the Respondent began its full production on March 8, 2011, the start of normal or substantially normal operations. Thus, on that date, it employed 16 unit employees which constituted 66% of its total work complement of 24 as of time of the hearing in August, 2011. Fourteen employees who had been employed by Rich Products at the time of its closedown in July, 2010, worked in all of the Respondent's seven job classifications[9] on March 8, and in August, 2011.

In *Fall River*, when the employer had hired employees "in virtually all job classifications, had hired at least 50 percent of those it would ultimately employ in the majority of those classifications, and it employed a majority of the employees it would eventually employ when it reached full complement" and had begun normal production, the employer had reached its substantial and representative complement. *Fall River*, above at 52. At that time, a majority of the successor's employees were former employees of the predecessor, and a bargaining obligation attached. Here, too, on March 8, 2011, the Respondent had hired employees "in virtually all job classifications, had hired at least 50% of those it would ultimately employ in the majority of those classifications, employed a majority of the employees it would eventually employ when it reached full complement and had begun normal production, the Respondent had reached its substantial and representative complement.

Accordingly, when the Respondent began full operations on March 8, 2011, it employed 16 unit employees, 14 of whom were former Rich employees.

At the time the Union made its demand for recognition on February 11, the Respondent had hired a substantial and representative complement of employees. Thus, on that date, it had hired 14 former Rich unit employees. One month later, on March 8, when the Respondent began full operations, it employed 16 unit employees. Accordingly, at the time that Respondent began full production on March 8, it employed a substantial and representative complement of employees.

I accordingly find and conclude that as of March 8, 2011, the Respondent employed a substantial and representative complement of employees at the Niagara Street facility, a majority of whom in an appropriate unit had been formerly employed by Rich Products.

4. The Bargaining Obligation

The question to be answered is whether "those employees who have been retained will understandably view their job situation as essentially unaltered." See *Golden State Bottling Co.,* 414 U.S. 168, 184 (1973); *NLRB v. Jeffries Lithograph Co.,* 752 F.2d 459, 464 (9th Cir. 1985). This emphasis on the employees' perspective furthers the Act's policy of industrial peace. If the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their

[9] The classifications are manufacturing support worker; processor; maintenance mechanic; processor/filler operator; filler operator; maintenance mechanic; maintenance mechanic/electrician.

dissatisfaction may lead to labor unrest. See *Golden State,* above, at 184; *Fall River* above, at 43-44. Accordingly, the successorship doctrine preserves industrial peace by promoting stability in collective-bargaining relationships. The employees' representative of the predecessor's employees should not be denied the opportunity to engage in collective-bargaining with the Respondent. Although the Union did not have any expectation that Rich Products would reopen its facility, as seen by the Termination Agreement, nevertheless the Respondent began essentially similar operations there and eagerly recruited and employed Rich's employees in order to quickly obtain the services of an experienced, professional crew who were familiar with the machinery and equipment now used by the Respondent.

When examining potential successorship situations, the test is "whether it may be reasonably assumed that, as a result of transitional changes [in the employing industry], the employees' desires concerning [continued union representation] is likely to have changed." *Ranch-Way, Inc.,* 183 NLRB 1168 (1970). Here, there is no evidence to suggest that the employees no longer wish to be represented by the Union. To the contrary, the continuity in the employing entity provides strong support for a finding that the employees still wish to be represented by the Union.

I find and conclude that the Respondent is the legal successor to Rich Products Corporation and a majority of its unit employees were employees of Rich Products at a time when it employed a substantial and representative complement of employees and began full production. I further find that the Union is the exclusive representative of the employees for purposes of collective bargaining, and that the Respondent has a duty, on request, to bargain with the Union for those employees.

The Board has held, consistent with Supreme Court precedent, that a successor employer inherits the collective-bargaining obligation of its predecessor if a majority of the successor's employees in an appropriate bargaining unit were employed by the predecessor, and if there exists "substantial continuity between the enterprises." *Van Lear Equipment, Inc.,* 336 NLRB 1059, 1063 (2001), citing *Fall River*, above; *NLRB v. Burns Security Services*, above at 80, fn. 4 (1972).

The Board will normally assess whether an employer is a successor as of the time a union makes its demand for recognition and bargaining, provided the employer has already hired a substantial and representative complement of employees. See *MSK Corp.,* above.

Having found that the Respondent is the successor to Rich Products, I must find when the Respondent's bargaining obligation with the Union matured when two conditions were met. First, when the Respondent had hired a substantial and representative complement of employees, a majority of whom had been unit employees in a unit represented by the Union, and second, when the Union made an effective demand for recognition. *Cadillac Asphalt Paving*, 249 NLRB 6, 9 (2007). These two conditions need not occur in any particular order. *MSK Corp.,* above.

Inasmuch as the Union's demand for bargaining made on February 11, 2011 is considered to be a continuing demand, it ripened on March 8, 2011 when the Respondent began full production with a substantial and representative complement of employees. Accordingly, the Respondent had an obligation to bargain with the Union on as of March 8, 2011.

B. The Request for Information

The Respondent first argues that inasmuch as it is not the legal successor to Rich

Products, it had no obligation to provide the information requested by the Union on February 11, 2011. Inasmuch as I have found that the Respondent is the successor to Rich Products it is obligated to provide the information.

The information requested includes a current list of bargaining unit employees, including (1) their names, job titles, shifts, status as full-time or part-time employees, rates of pay, benefits, home addresses, home phone numbers and e-mail addresses; (2) a copy of the purchase, sale, and/or lease agreement between Rich Products Corporation and Island Oasis for the Niagara Street facility; (3) copies of all documents referring to and/or concerning the application and hiring of former bargaining unit employees of Rich Products Corporation, the predecessor employer, by Island Oasis including without limitation, the completed application forms, completed questionnaires and documents distributed to those employees; and (4) copies of all documents concerning and/or referring to employment at Rich Products Corporation and/or Island Oasis which the Respondent distributed to bargaining unit employees.

The Respondent argues that certain documents are not relevant, or are privileged or confidential. The law is well settled that information relating to unit employees is presumptively relevant and must be furnished on request. *La Gloria Oil & Gas Co.,* 338 NLRB 858, 858 (2003). Accordingly, the information requested in paragraphs 1, 3, and 4, above, must be produced.

As to the information requested in paragraph 2, the purchase, sale and/or lease agreement between Rich and the Respondent, there was no testimony concerning the relevance of such information. However, the Respondent has an obligation to provide a union with information relevant to its duty as a representative of the employees so that it may process a grievance or file a charge. The Board has held that an employer has an obligation to furnish a union information relating to a proposed or completed sale, including sales agreements. See *Compact Video Services*, 319 NLRB 131, 142-143 (1995), enfd. 121 F.3d 478 (9th Cir. 1997); *Live Oak Skilled Care & Manor*, 300 NLRB 1040, 1049 fn. 20 (1990), where the judge stated that "a successor violates Sec. 8(a)(5) by refusing to furnish the union with documents and other data relevant to the successorship transaction" citing *Fremont Ford,* 289 NLRB 1290, 1297 (1988). Here, the Union requested this information on February 11, 2010, perhaps in an effort to determine whether the Respondent was the successor to Rich Products. It filed a charge on March 10 alleging such a successorship status.

I accordingly find and conclude that the Respondent was required to furnish all the information requested by the Union in its letter of February 11, 2011.

Conclusions of Law

1. The following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance associates and all local truck drivers employed by the Company at its facilities presently located on Niagara Street, Buffalo, New York, excluding all office clerical associates, over-the-road truck drivers, laboratory and quality control associates, managerial associates, salesmen, professional associates and guards and Team Leaders as defined in the Act, and all contractor's associates.

2. Since March 8, 2011, Bakery, Confectionery, Tobacco Workers & Grain Millers, AFL-CIO, CLC, Local 36G has been the exclusive collective-bargaining representative of the employees in the above unit.

3. By refusing to recognize and bargain with Bakery, Confectionery, Tobacco Workers & Grain Millers, AFL-CIO, CLC, Local 36G as the exclusive collective-bargaining representative of its employees in the appropriate unit set forth above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

4. By failing and refusing to provide the Union with all the information requested in its letter of February 11, 2010, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that the Respondent has illegally failed and refused to recognize and bargain with the Union, I shall order the Respondent to recognize the Union as the exclusive collective-bargaining representative of its employees in the above-described unit and, on request by the Union, meet and bargain in good faith.

I shall also order that the Respondent be ordered to provide the Union with all the information it requested in its letter of February 11, 2011.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Island Oasis Manufacturing, LLC, Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain in good faith with Bakery, Confectionery, Tobacco Workers & Grain Millers, AFL-CIO, CLC, Local 36G,as the exclusive collective-bargaining representative of its employees in the following appropriate bargaining unit:

> All production and maintenance associates and all local truck drivers employed by the Company at its facilities presently located on Niagara Street, Buffalo, New York, excluding all office clerical associates, over-the-road truck drivers, laboratory and quality

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

control associates, managerial associates, salesmen, professional associates and guards and Team Leaders as defined in the Act, and all contractor's associates.

(b) Refusing to bargain, on request, with Bakery, Confectionery, Tobacco Workers & Grain Millers, AFL-CIO, CLC, Local 36G, by not providing the Union with all the information it requested in its letter of February 11, 2011.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive representative of the employees in the appropriate collective-bargaining unit set forth above.

(b) Supply to the Union all the information the Union requested in its letter of February 11, 2011.

(c) Within 14 days after service by the Region, post at its facility in Buffalo, New York, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 8, 2011.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 6, 2011.

_____
Steven Davis
Administrative Law Judge

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail or refuse to recognize and bargain in good faith with Bakery, Confectionery, Tobacco Workers & Grain Millers, AFL-CIO, CLC, Local 36G, as your exclusive collective-bargaining representative in the following appropriate bargaining unit:

> All production and maintenance associates and all local truck drivers employed by the Company at its facilities presently located on Niagara Street, Buffalo, New York, excluding all office clerical associates, over-the-road truck drivers, laboratory and quality control associates, managerial associates, salesmen, professional associates and guards and Team Leaders as defined in the Act, and all contractor's associates.

WE WILL NOT refuse to bargain, on request, with Bakery, Confectionery, Tobacco Workers & Grain Millers, AFL-CIO, CLC, Local 36G, by not providing the Union with all the information it requested in its letter of February 11, 2011.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL on request, bargain in good faith with the Union as the exclusive representative of the employees in the appropriate collective-bargaining unit set forth above.

WE WILL provide to the Union all the information the Union requested in its letter of February 11, 2011.

ISLAND OASIS MANUFACTURING, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

130 S. Elmwood Avenue

Suite 630

Buffalo, New York 14202

Hours: 8:30 a.m. to 5 p.m.

716-551-4931.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.